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No. 94-765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GOODMAN HOLDINGS AND
ANGLO IRISH BEEF PROCESSORS INTERNATIONAL,
Petitioners,

v.

RAFIDAIN BANK,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS

KENNETH W. STARR
Counsel of Record
DAVID G. NORRELL
CHRISTOPHER LANDAU
DAVID M. HAUG
KIRKLAND & ELLIS
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Dated: December 5, 1994 *Attorneys for Petitioner*

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REPLY BRIEF OF PETITIONERS

Rafidain's brief in opposition offers nothing but smoke and mirrors. Rafidain attempts to dissuade this Court from granting review by (1) distorting the facts and holding below; (2) mischaracterizing the conflicting caselaw, and (3) advancing a number of "alternate" grounds—not relied on or even discussed below—to support the judgment. None of these attempts can withstand even cursory scrutiny.

1. Rafidain attempts to divert this Court's attention from the real issue in this case by injecting new facts and disregarding facts previously admitted. The question here is whether Rafidain's suspension of payment under the letters of credit *from* its bank accounts in New York *to* Goodman's bank account in Ireland caused a "direct effect in the United States." Rafidain asserts that it did not, on the ground that "the letters of

credit contain *no requirement* as to the source of Rafidain's payments." Br. Op. 10 (emphasis added). But that just begs the question: must a contract designate the United States as the place of payment in order for nonpayment by a foreign sovereign to establish a "direct effect"?

The D.C. Circuit answered "yes." Rafidain's breach had no "direct effect in the United States," the Court held, because "neither New York nor any other United States location was *designated* as the place of performance where money was supposed to have been paid *by Rafidain* or to Goodman." App. 7a (emphasis added; internal quotations omitted). Thus, in the Court's view, "Rafidain might well have paid [the letters of credit] *from* funds in the United States banks but it might just as well have done so *from* accounts located outside of the United States." *Id.* The Court did not question that a failure to pay under letters of credit *from* United States accounts could cause a "direct effect in the United States"; it simply held that no such "direct effect" was possible where the letters did not specify the United States as the source of payment.

Rafidain now attempts to distort that holding and the facts of this case by insisting that the reason no "direct effect" was found below was that the "place of payment" under the letters was Ireland, not New York. Br. Op. i, 3, 6-7. But that is like insisting that a glass cannot be half full because it is half empty. Most of the relevant payments, as Rafidain has admitted, *see* Pet. App. 14a-15a n.2, were made *from* Rafidain's accounts in New York *to* Goodman's accounts in Ireland. Those payments, therefore, had "direct effects" in *both* New York and Ireland; the two are not mutually exclusive. Rafidain's attempt to draw a dispositive distinction between payment *from* the United States and payment *in* the United States, Br. Op. 9, has no basis in the statute or in logic, and was not the theory of the courts below.

This case, moreover, arises on a Rule 12(b) motion to dismiss on the pleadings; therefore the presumption *must* be that the allegations in Goodman's complaint "embrace those specific

facts that are necessary to support the claim." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990).[1] Rafidain cannot evade review by insisting on its own version of the facts, or suggesting that resolution of this case would enmesh this Court in a factual thicket. Given the procedural posture and the holding below, this case presents a clean question of law.

2. Rafidain attempts to circumvent the circuit split described in Goodman's petition by first suggesting that it is moot in light of this Court's decision three Terms ago in *Republic of Argentina v. Weltover*, 112 S. Ct. 2160 (1992). But that case neither purported to nor did wipe off the books all previous cases applying the "direct effect" clause. Goodman's reliance on pre-*Weltover* cases, then, is hardly "absur[d]," Br. Op. 16, as that case did not raise (and thus could not resolve) the issue here—whether a foreign sovereign's wrongful suspension of pattern of prior payment from the United States created a "direct effect" although the contract did not specifically designate the United States as place of payment. To the extent *Weltover* sheds any light on that question, it strongly supports *Goodman*'s point: the "direct effect" clause should be interpreted in a manner consistent with commercial reality, and not narrowed by reliance on any mechanical formula. *See, e.g.*, *Weltover*, 112 S. Ct. at 2168 (rejecting prevailing view that "direct effect in the United States" incorporates *independent* requirements of substantiality and foreseeability). Far from *relying* on *Weltover*, thus, the D.C. Circuit took pains to *distinguish* it: "The situation here is quite different." App. 7a. Rather, the court relied primarily on a pre-*Weltover* case, *International Housing Ltd. v. Rafidain Bank*, 893 F.2d 8, 11-12

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[1] Thus, Rafidain is not entitled to the negative inference that because it admitted to making only 25 of the 37 payments from *inside* the United States, the other 12 must have been made from *outside* the United States. Br. Op. 10, 12 n.9. To the contrary, as noted in text, at this stage all factual inferences must be drawn in *Goodman*'s favor.

(2d Cir. 1989), holding that a foreign sovereign's nonpayment cannot have a "direct effect in the United States" where a contract does not require payment from United States accounts, although past payments had actually been made from such accounts.[2]

On the merits, Rafidain's efforts to distinguish away the split are in vain. Rafidain simply reiterates the misleading assertion that this case does not involve "payment in the United States," and then asserts that the cases supporting Goodman did. Br. Op. 16-17. But those cases clearly establish (and logic supports) the proposition that the issue of "direct effect in the United States" cannot be resolved solely by scrutinizing the four corners of a contract. That would be to exalt form over substance. The issue, rather, is whether the parties "could *reasonably have expected* that payment would be called for at a bank in the United States." *See Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987) (internal quotation omitted). And Rafidain only

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[2] Contrary to Rafidain's implication, *see* Br. Op. 15-16, the "direct effect" issue continues to bedevil the lower federal courts in *Weltover*'s wake. *See, e.g., United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1236-1237 (10th Cir. 1994); *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994); *Federal Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1291 (3d Cir. 1993); *Antares Aircraft v. Federal Republic of Nigeria*, 999 F.2d 33, 34 (2d Cir. 1993); *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1387 (5th Cir. 1992); *Antares Aircraft v. Federal Republic of Nigeria*, 948 F.2d 90, 94-95 (2d Cir. 1991); *Reed Int'l Trading Corp. v. Donau Bank AG*, 1994 WL 621280, *2-*3 (S.D.N.Y. Sept. 30, 1994); *National Bank of Kuwait v. Rafidain Bank*, 1994 WL 376037, *5-*6 (S.D.N.Y. 1994); *Dibrell Bros. Tobacco Co. v. Rafidain Bank*, 1994 WL 324331, *2 (D.D.C. 1994); *Gabay v. Mostazafan*, 151 F.R.D. 250, 255, n.8 (S.D.N.Y. 1993); *Maizus v. Weldor Trust Reg.*, 820 F. Supp. 101, 104 (S.D.N.Y. 1993); *Kao HWA Shipping Co. v. China Steel Corp.*, 816 F. Supp. 910, 918 (S.D.N.Y. 1993); *Optopics Labs. Corp. v. Savannah*, 816 F. Supp. 898, 907 (S.D.N.Y. 1993); *Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for A.W. Galadari*, 810 F. Supp. 1375, 1386-1387 (S.D.N.Y. 1993).

undermines its own position by noting that one of Goodman's cases, *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 798 (9th Cir. 1989) found "direct effect" jurisdiction in the absence of a contractual designation despite applying the *additional* (and erroneous) requirements of "foreseeability" and "substantiality." *A fortiori*, the conclusion of jurisdiction there conflicts with the conclusion of no jurisdiction here.

3. Finally, Rafidain offers three "additional grounds, not reached by the courts below," to uphold the judgment: (1) personal jurisdiction, (2) forum non conveniens, and (3) international comity. Br. Op. 18-21. This Court's docket, however, is not limited to cases where a party seeking review must necessarily prevail under any conceivable theory. To the contrary, the Court routinely grants review even in cases where the party seeking review might ultimately lose, reversing and remanding for further consideration of other issues and theories. *See, e.g., Powell v. Nevada*, 114 S. Ct. 1280, 1283 (1994); *Elder v. Holloway*, 114 S. Ct. 1019, 1021 (1994); *Wyatt v. Cole*, 112 S. Ct. 1827, 1834 (1992); *Molzof v. United States*, 112 S. Ct. 711, 718 (1992). The D.C. Circuit squarely based its judgment on its conclusion that Rafidain's breach caused no "direct effect in the United States," and that is the issue presented for review here. Rafidain's attempt to inject other issues into the case at this stage is a transparent diversionary ploy.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

KENNETH W. STARR
Counsel of Record
DAVID G. NORRELL
CHRISTOPHER LANDAU
DAVID M. HAUG
KIRKLAND & ELLIS
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Attorneys for Petitioners

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